No. 95-789

In The

Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS; COUNTY OF SONOMA,

Petitioners,

vs.

DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., GOLDEN GATE AND SIERRA NEVADA UNILATERAL APPRENTICESHIP COMMITTEES, AIR CONDITIONING TRADES ASSOCIATION, INC., INDEPENDENT ROOFING CONTRACTORS OF CALIFORNIA, INC., WALTHER ELECTRIC COMPANY AND THE ABC NATIONAL POWER LINE ERECTOR UNILATERAL APPRENTICESHIP COMMITTEE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This brief[1] is being filed jointly by six state or federally approved unilateral apprenticeship committees.[2] These committees are sponsored by trade organizations comprised of construction contractors who are not signatory to a collective bargaining agreement with labor organizations belonging to the Building Trades Department of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and the programs represent literally thousands[3] of participant apprentices who would be denied the opportunity to work and train on state and local public works projects if the State of California prevails in its attempt to regain the power to deny apprenticeship opportunities to those enrolled in programs it will not approve.[4] These programs, all of whom were forced to undergo extensive administrative appeals and subsequent litigation in order to become approved in their respective states, owe their entire existence and success to the various decisions and opinions of the United States Court of Appeals for the Second, Eighth, Ninth and Tenth Circuits, as well as the California Supreme Court, correctly applying the preemption

1. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Court Rule 37.3.

2. There are now over 17,000 trainees in ABC programs.

3. The ABC Golden Gate Unilateral Apprenticeship Committee is also the Plaintiff in the companion case of *Associated Builders and Contractors, Inc. v. Curry*, 68 F.3d 342 (9th Cir. 1995), which was not appealed to the Supreme Court and is law of the case as to those programs. For this reason also, Amici believe certiorari was improvidently granted.

4. The Court is also invited to consider the dismal record of non-union apprenticeship discrimination first addressed by this Court in 1988 with the reversal of the Ninth Circuit in *Washington State Electrical Contractors Assn. v. Forrest*, 488 U.S. 806 (1988), and in *Local Union 598 v. J.A. Jones Construction Co.*, 846 F.2d 1213 (9th Cir.), *aff'd summ.*, 488 U.S. 881 (1988), and, which was finally approved based upon the logic of the Ninth Circuit's opinion in this action, *Inland Empire Chapter of ABC v. Dear*, 78 F.3d 593 (9th Cir. 1996).

provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), to invalidate state prevailing wage law which allows only a California "approved" apprenticeship program to follow its standards on public works construction, while denying federally approved, other state approved and non-approved programs the right to follow their standards or to adopt the approved programs standards on public works.[5]

Pursuant to their fiduciary duties under ERISA, and in the sole and exclusive interests of the employee benefit plan's participants (the apprentices), Amici urge the Supreme Court to reject this belated attempt by the State of California to reverse the decisions by the Ninth Circuit Court of Appeals in *Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 112 L. Ed. 2d 46 (1990) and *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 120 L. Ed. 2d 869 (1992), as well as the California Supreme Court's decision in *Southern Calif. Chpt. of Associated Builders and Contractors v. California Apprenticeship Council*, 4 Cal. 4th 422 (1992). Despite the State of California and the Building Trades Department of the AFL-CIO's failed attempt to repeal ERISA preemption over program content in H.R. 1036 and S.B. 1580, the State of California brings this appeal solely to re-establish the Building Trades Department's past monopoly position over apprenticeship training, denying non-union apprenticeship program participants the ability to train and work on public works construction.[6] With three federal agencies (Bureau of

5. Amici's position is also supported by the Coalition for the Preservation of ERISA Preemption ("COPEP"), the members of which are listed in a June 15, 1993 letter to Secretary of Labor Robert Reich in opposition to H.R. 1036. *See* Appendix A.

6. Some of the skills necessary to become a journey level craft person can only be gained on public or quasi-public construction, such as wiring for radar control circuits at an airport, or specialized pipe construction for nuclear industries.

Apprenticeship and Training, Pension Benefits Welfare Administration and Wage-Hour Division of the United States Department of Labor) regulating ERISA training programs, and a specific grant of private causes of action by the Secretary of Labor and any "participant, beneficiary or fiduciary" under 29 U.S.C. § 1132, for failure to provide adequate training or otherwise follow the plan documents, the State of California's attempt to add yet another layer of regulation cannot justify the obvious and intended harm to the stated goal of national standards for benefit plans articulated under ERISA and a national standard for training excellence articulated by the National Apprenticeship Act, 29 U.S.C. § 50 (commonly known as the Fitzgerald Act). Even the State of California's mischaracterization of the facts in this action should not cause this Court to overturn the Ninth Circuit's decision, which promotes the goal uniform, a national apprentices standards and the Fitzgerald Act's implementing regulations at 29 C.F.R. Part 29.

The Associated Builders and Contractors, Inc., Golden Gate Chapter Unilateral Apprenticeship Committee is an employee benefit plan organized and operating pursuant to the provision of 29 U.S.C. § 1001 *et seq.*, which trains over 130 apprentices throughout Northern California in the Electrical, Plumbing, Carpentry, and Laborers crafts, not including students in pre-apprenticeship programs for math improvement offered to disadvantage youth in Oakland, California, and those enrolled in English as a second language courses taught concurrently with the regular apprenticeship programs.[7] ABC Golden Gate is also

7. ABC Golden Gate also has similar programs approved by the Bureau of Apprenticeship and Training of the United States Department of Labor. However, the State of California refuses to allow people enrolled in these federal programs to be employed according to the programs' wage rates on public works projects, so that the programs participants denied public works opportunities are not being utilized. The State of California also refuses to (Cont'd)

the Plaintiff in the case of *ABC v. Curry, supra*, which was related to this action by the United States District Court, Northen District of California, and subsequently decided by the Ninth Circuit, but from which no appeal or petition for certiorari was filed.

ABC's Sierra Nevada Chapter Unilateral Electrical, Plumbing, Painting, Carpentry, Drywall/Lather, and Laborer apprenticeship committees operates both State of Nevada approved and federally approved apprenticeship training programs pursuant to a permanent injunction issued by the United States District Court and upheld by the Ninth Circuit Court of Appeals for the Ninth Circuit in the case of *Electrical Joint Training Committee v. MacDonald, supra*. Only after this Court denied certiorari of the decision upholding the District Court's injunction (the District Court opinion is reported at 731 F. Supp. 966) forcing the State of Nevada to allow BAT approved training programs to follow their standards on state public works projects did the State of Nevada began approving non-union programs in the construction industry. Because the State of Nevada started approving programs, BAT program approval is no longer available for new programs except those that operate exclusively in federal enclaves.[8] There are approximately 88 apprentices currently training in the programs sponsored by the Sierra Nevada Chapter of ABCs. The Sierra Nevada Chapter of

(Cont'd)
allow the ABC Golden Gate Laborers program to operate on prevailing wage projects despite its state approval since California state regulations require all non-union programs to pay union apprenticeship rates on public works projects and the State cannot determine the "prevailing" union rate for laborer apprentices.

8. If the decision of the Ninth Circuit in this action is reversed, *Hydrostorage* and *MacDonald* will no longer be valid, which means that BAT approved programs, such as those approved on Indian lands and in other states that do not have a state apprenticeship council (like Utah), will no longer be able to operate on Nevada public works construction projects.

ABC Electrical Training Program is now the largest and most successful construction craft apprenticeship program in Nevada, the second largest being the Southern Nevada Chapter ABC Electrical Training Program.

The Air Conditioning Trades Association, Inc. ("ACTA") is a non-profit trade association representing contractors in the State of California who specialize in heating, ventilation, and air conditioning. ACTA sponsors its own apprenticeship program which provides training for journeymen sheet metal workers. The ACTA unilateral apprenticeship program was initially denied state approval by the California Apprenticeship Council ("CAC"). However, subsequent litigation resulted in the CAC reversing their decision by order of the California Court of Appeal, First Appellate District. Despite the order of the Court of Appeals, and the October 12, 1995 Department of Industrial Relations' policy memoranda (attached hereto as Appendix B), which abandoned artificial geographic restrictions simply to protect the territory of other apprenticeship programs, the State of California has started imposing geographic and other non-Fitzgerald Act restrictions on the program once certiorari was granted in this case.[9]

The Independent Roofing Contractors of California, Inc. ("IRCC") is a non-profit trade association representing roofing contractors in Northern California. The IRCC sponsors its own apprenticeship program which provides training for roofers.

9. *See* July 2, 1996 letter from the Division of Apprenticeship Standards regarding training in Fresno, attached hereto as Appendix C. Since the physics of air conditionaing in Sacramento are the same 150 miles to the south in Fresno, these artificial restrictions on training are purely designed to create or preserve make believe competitive advantages held by union programs operating in Fresno. Learning is not a limited resource and there is not a natural monopoly over education; there is no demonstrable evidence that the existence of a non-union program training fifty to one hundred apprentices will adversely impact the central California construction market of hundred of thousands of workers. *See, e.g. So. Cal ABC, supra*, 4 Cal. 4th 422.

Like the ACTA program, the IRCC unilateral apprenticeship program was first denied approval by the California Apprenticeship Council, despite its approval by the federal BAT.[10] Subsequent litigation resulted in the CAC approving the IRCC program by order of the Superior Court of the State of California, in and for the City and County of San Francisco. There are approximately 220 apprentices training in this program currently, the vast majority of whom are members of ethnic minority groups, and much of the work is conducted with simultaneous translations into other languages.

The Walther Electric Company ("Walther") is a electrical construction contractor located in the town of Ceres, California. Walther is not signatory to a collective bargaining agreement with any labor organization representing the company's employees. Walther sponsors its own state approved apprenticeship program which trains the employees of Walther to become certified journeymen electricians. Litigation following the CAC's initial rejection of the Walther program resulted in later CAC approval by order of the California Court of Appeal, First Appellate District. The hardship of obtaining state approval for its apprenticeship program was the subject of Congressional inquiry and was one of the reasons for the defeat of H.R. 1036. *See* 103 Cong. 1st Sess., 139 Cong. Rec. 8965-8966.

ABC National Power Line Erectors Unilateral Apprenticeship Committee is approved by Region 4 of the Federal Bureau of Apprenticeship and Training as well as the State of Florida, which is the location of its administrative headquarters. Power line construction, also known as outside wireman's work, usually involves a project spanning several States at the same time. Because the transient nature of the

10. Of course, California refused to recognize the program's BAT approval on State prevailing wage projects, forcing IRCC and ACTA to seek state approval.

project precludes any "permanent" training facility, the ABC National Power Line Erectors training program operates throughout the United States by establishing mobile apprenticeship classrooms that follow the contractor's workforce, using the contractors' supervisors and journey people as its instructors, and a nationally BAT approved set of videos and text books for the classroom instruction portion of the training. One of the program's subscribing members is Irby Construction, the world's largest powerline construction company.[11] There are approximately 280 apprentices in this ABC program. As can be seen from the case of *ABC National Line Constructors v. Aubry*, 68 F.3d 343 (9th Cir. 1995), the State of California refused to allow contributions to this program to count towards the mandatory apprenticeship contribution requirements of the State's Prevailing Wage Laws, and refuses to recognize apprentices in this program working in California as "approved" for purposes of the California Labor Codes' mandatory apprenticeship employmnet requirements.

SUMMARY OF ARGUMENT

For thousands of years, workers have learned their craft by the apprenticeship method. From Biblical times, to the guild system, to the new deal acceptance of the modern labor movement in the United States in the 1930's, the apprenticeship

11. Despite cries of "lowering apprenticeship standards" the apprenticeship program at issue in Dillingham, and all ABC programs, use federally approved national training materials and a nationally BAT approved curriculum. Like most construction industry programs, the ABC programs and the program in Dillingham do not have classroom work (called related and supplemental instruction) during the summer months, but there was never any challenge to the educational content of its apprenticeship training syllabus, since all apprenticeship programs use the same core curriculum approved nationally by BAT for that craft. ABC's textbooks and lecture notes, marketed by Prentice-Hall under the trade name of "Wheels of Learning," were adopted in 37 states as the required "school to work" vocational trade training program in most construction crafts.

system has successfully trained the majority of construction workers in the United States and abroad. Apprenticeship differs from other educational systems because apprenticeship requires an agreement (called indenture) between the student-worker (an apprentice), the employer-instructor (master or contractor), and the accrediting agency (guild, union, or trade association) whereby the apprentice exchanges his or her labor at lower than market rates for instruction and a chance to work in the masters' shop. The master craftsman is both the teacher and the employer, responsible for the health and welfare of the apprentice during the term of his or her indenture. The combination of all the employers/masters act as a governing board to supervise the level of skill, education and working conditions of the apprentices. Historically, the governing body was the craft guild, later the craft union, and, after the Taft-Hartley Amendment to the National Labor Relations Act (29 U.S.C. § 186) prohibited employer participation in union activities, an employer only or joint (union and employer sponsored) apprenticeship committee.[12] Since both the Taft-Hartley amendments to the National Labor Relations Act,and ERISA require the detail terms of the apprenticeship benefit plan to be set forth in writing, called the program's "standards," and since the payment for labor in exchange for education is the essence of the apprentice program, apprenticeship is perhaps the only employee benefit plan where wages are specially made an essential part of the plan and are expressed in the plan documents. To regulate the wages contained in the standards, other than the imposition of a uniform minimum wage applicable

12. Like many states that regulate apprenticeship, California once would only approve programs run by "joint" apprenticeship committees. This practice effectively barred all non-union programs from participation, since it would be an unfair labor practice under the National Labor Relations Act to create and recognize employees representatives without any union or employee support. Federal regulations recognize employer only apprenticeship committees, called Unilateral Committees, in 29 C.F.R. Part 29.2(i).

to *all* employees, is to control the substance of the apprenticeship program.

The California Prevailing Wage Laws, California Labor Code § 1770, *et seq.*, sets the minium wages that contractors must pay workers employed on public works construction.[13] Public works contractors are allowed only to utilize "state approved" apprentices on state and local public works projects but must compensate such apprentices according to "the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed." Cal. Labor Code § 1777.5.[14] The apprentice wage, which is found in the standards of every apprenticeship program (see 29 C.F.R. § 29.5(5); Title 8, California Code of Regulations § 212(c)(7)), and, for public works, is derived from the journeyman union prevailing wage rate (8 Cal. Code of Regulations § 230.1(b)), is lower then the prevailing wage which is required to be paid to each journeyman workers on state projects because requiring the employer to pay the full rate will preclude use of lesser skilled employees on the

13. Unlike the situation of a public entity engaged in essentially a market participant activity, apprenticeship and prevailing wages are regulations of state-wide concern and do not emanate from nor are they modifiable by the "building entity". Regulation of apprenticeship is administered by a State of California agency independent, and often opposed to, the public agency building the project. Thus, the reasoning articulated in the case of *Building and Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. __, 113 S. Ct. 1190 ("Boston Harbor") has consistently been rejected in California and other apprenticeship cases.

14. Unlike federal rules which permit the program to establish its own wage rates on public and private works projects, California requires all apprenticeship programs to follow the union apprenticeship rates even though those rates may not correspond to the advancement of the apprentices in the non-union program. For example, several non-union electrical apprenticeship program use a four year curriculum, with more classroom work over a shorter period of time, while the union wage rates set the standards for public works construction based upon a five year program, with less instruction per year.

project. Regardless of the wage rates specified in the ERISA standards of a non-union apprenticeship program, the State of California insists that the apprentices be paid according to the union apprenticeship wage rate. *See, e.g.*, 8 Cal. Code of Regulations § 208. If the apprentice is not indentured with a CAC "approved" program, then he or she must be paid at the full journeyman prevailing wage rate, effectively precluding the use of non-state approved apprentices on all public works construction.

This scheme of state interference with apprenticeship training is and should be preempted by ERISA. Apprenticeship and training programs are expressly defined under ERISA as employee welfare benefit plans. See 29 U.S.C. § 1002(1). The California Prevailing Wage scheme at issue in this case clearly "relates to" and has a connection with apprenticeship and training plans since they favor one type of ERISA plan, those apprenticeship programs approved by the CAC, over other ERISA plans. For example, if an apprenticeship program is approved in the State of Utah by the United States Department of Labor , Bureau of Apprenticeship and Training ("BAT"), the apprentices indentured in that program cannot work on a California public works project and be paid an apprentice rate. The apprentice wage exemption will not be granted under the California prevailing wage laws even though the Utah program was approved under the *same federal criteria* as California apprenticeship programs.[15] If one of ERISA's goals is to

15. This action only concerns whether ERISA training programs, whether approved by the CAC or not, are entitled to the apprentice wage exemption under the California prevailing wage laws. It does not concern the validity of state laws establishing apprenticeship approval criteria separate and apart from the criteria set forth in the Fitzgerald Act regulations, 29 C.F.R. Part 29. All courts considering that issue have found such state laws preempted by ERISA. *See, e.g., Electrical Joint Apprenticeship Committee v. MacDonald, supra*); *Southern Calif. Chpt. of Associated Builders and* (Cont'd)

eliminate the "patchwork scheme of regulations" so that benefit plans would operate under a single set of laws, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10-11 (1987), then the California Prevailing Wage Law, which prevents the attainment of this goal by granting one ERISA plan preferential treatment over other, similar plans, must be preempted.

Further, the prevailing wage law relate to ERISA plans by mandating the wages which must be paid to apprentices on state public works projects. Apprenticeship programs are unique among welfare benefit plans in that they include a progressive wage scale as an essential component of the plan or program. See 29 C.F.R. § 29.5 (5). By mandating that apprentices from "non-favored," or non-approved programs be paid the full journeyman prevailing wage rate on public works projects, the State is forcing programs to change their wage structure and compensate apprentices at a level which is not commensurate with their skills. The wage rates are specified by the sponsor and approved by BAT, or in cases of state approved programs, the State Apprenticeship Council ("SAC"), as agent for BAT. As agents for BAT, SACs may discipline and even deregister programs which fail to meet the approved standards, or otherwise violate federal apprenticeship regulations. *See Joint Apprenticeship and Training Counsel of Local 363 v. New York State Dept. of Labor*, 984 F.2d 589, 591 (2nd Cir. 1993).

For several reasons, California's use of its prevailing wage laws to regulate apprenticeship cannot be considered "saved" under ERISA's savings clause, 29 U.S.C. § 1144(d). First, there is no traditional state interest in regulating benefit programs, only wages, and the California Prevailing Wage Laws clearly

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Contractors v. California Apprenticeship Council, supra; and, more recently, *Associated General Contractors v. Smith*, 74 F.3d 926 (9th Cir. 1996).

attempt to regulate both. *See WSB Electric, Inc. v. Curry*, __F.3d __, 1996 U.S. App. LEXIS 16027, 96 Cal. Daily Op. Service 5077 (9th Cir. 1996). Second, that a state law represents a traditional exercise of a state's police power, or regulates an area of traditional state concern, is of no matter when the law relates to ERISA plans. As such, the fact that the State of California has previously "regulated" apprenticeship through its prevailing wage laws is of no concern because the law relates exclusively to ERISA plans. Third, power once delegated cannot be redelegated, and the delegation of power, if any, by the federal BAT to a SAC pursuant to 29 C.F.R. Part 29 does not include any enforcement power to be delegated to another branch of state government. See, generally, *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942). The federal Fitzgerald Act, 29 U.S.C. § 50, and its regulations at 29 C.F.R. Part 29,[16] do not confer authority upon California's Department of Industrial Relations or Division of Labor Standards Enforcement to use the prevailing wage laws as a method of regulating apprentices indentured in ERISA programs, whether or not these programs are approved by the CAC. If there is any authority to set wages for apprenticeship programs, it is to be found either with BAT or the CAC, and it is to be enforced solely by the sanctions contained in 29 C.F.R. Part 29.

Essentially, the Ninth Circuit's decision in this action promotes and encourages training rather than create anarchy as described by Petitioners and various *amici* supporting Petitioners. Allowing the apprentice wage exemption to all ERISA training programs will force the CAC and other State Apprenticeship Councils to apply objective criteria when

16. These regulations are "a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor. . . ." *Siuslaw Concrete Const. v. Washington Dept. of Transportation*, 784 F.2d 952, 957 (9th Cir. 1986).

considering the approval of proposed apprenticeship programs and will preclude new laws and regulations which seek to prevent the growth of merit shop training throughout the State of California and the United States in general. By maintaining a stranglehold over public works construction, an area which provides essential and unique work experiences for an apprentice, the State simply seeks to force both approved and non-approved programs to conform with restrictive and burdensome regulations that cannot find their genesis in existing federal apprenticeship law. *See* November 9, 1993 statement by Congressman Fawell, beginning at 103 Cong. 1st Sess., 139 Cong. Rec. 8964, in opposition to amendments to overrule ERISA preemption of apprenticeship, H.R. 1036. As stated by Congressman Ballenger, at 8966, "The direct targets of this legislation are open shop contractors expanding into previously union-dominated territory, and the real victims, however, are the women, minorities, and young people who will be denied training opportunities." ERISA preemption, and the Ninth Circuit's *Dillingham* decision, will prevent such bureaucratic roadblocks that discourage, and not encourage, apprenticeship and on-the-job training.

ARGUMENT

I.

THIS PORTION OF CALIFORNIA'S PREVAILING WAGE LAW RELATES EXCLUSIVELY TO ERISA PLANS AND THEREFORE IS PREEMPTED BY ERISA.

A. The Expansive Scope Of ERISA Preemption.

ERISA is a comprehensive federal statute whose purpose is to "protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans. *Local Union 598 v. J.A. Jones Construction Co.*, 846 F.2d 1213 (9th

Cir.), *aff'd summ.*, 488 U.S. 881 (1988) (*quoting Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir. 1985)). To achieve this goal, Congress enacted ERISA's expansive preemption provision, 29 U.S.C. § 1144(a), which provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." "The basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee welfare benefit plans." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, __ U.S. __, 115 S. Ct. 1671, 1677-1678 (1995).

ERISA's preemption clause must be applied expansively by the judiciary to ensure uniformity of law governing employee benefit plans. The provision "is conspicuous for its breath. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 112 L. Ed. 2d 356, 364 (1990); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 112 L. Ed. 2d 474, 483 (1990).[17] State laws are subject to preemption if they have a "connection with or reference to" ERISA plans, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), these words being interpreted according to their ordinary, dictionary meaning. *District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. 580, 583 (1992). A state law may be subject to preemption even though the law is not specifically designed to affect such plans, or the effect is only indirect. *Ingersoll-Rand*, 133 U.S. at 139. Further, preemption will occur even if the state law is "consistent with ERISA's substantive requirements" or was enacted to "effectuate ERISA's underlying purpose." *Metropolitan Life Ins. Co. v.*

17. State law includes "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1).

Massachusetts, 471 U.S. 724, 105 S. Ct. 2380, 2388-2389 (1985).[18]

Any preemption analysis, whether under ERISA or, for example, the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, is undertaken with the presumption that Congress did not intend to preempt traditional areas of state regulation. *Blue Cross*, 115 S. Ct. at 1676-1677; *see, e.g., Massachusetts v. Morash*, 490 U.S. 107 (1989) (Massachusetts law requiring employers to pay discharged employees full wages, including vacation payments, on the date of discharge not preempted by ERISA). However, due to the expansive text of ERISA, state laws which are determined to "relate to" or have a "connection with" ERISA plans, regardless of whether they can be classified as a traditional exercise of a state's police power, are subject to preemption. *Blue Cross*, 115 S. Ct. at 1677. As correctly stated by the Ninth Circuit in *J.A. Jones*, 846 F.2d at 1220-1221:

> In order to avoid preemption, it is not sufficient that a state statute represent the exercise of a traditional state power. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901, 106 S. Ct. 3267, 91 L. Ed. 2d 558 (1986) & *aff'd mem. sub nom. Roberts v. Burlington Indus., Inc.*, 477 U.S. 91, 106 S. Ct. 3267, 91 L. Ed. 2d 558 (1986). A purported fundamental state interest is relevant only when there is an element of uncertainty as to whether the challenged state law falls within the scope of the ERISA preemption clause. In cases of uncertainty, our analysis is guided by a

18. State laws which have only a "tenuous, remote, or peripheral" connection with ERISA plans, such as those of general applicability, are not subject to preemption. *Greater Washington*, 113 S. Ct. at 583 n. 1.

rebuttable "presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation." See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985).

However, the strength of the state interest is of no consequence where the state law clearly "purports to regulate" an employee benefit plan. "In order to avoid being preempted, a state law in addition to being an exercise of traditional police powers must also affect the plan 'in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to" the plan.' " *Gilbert*, 765 F.2d at 327 (*quoting Shaw*, 463 U.S. at 100 n. 21).

Regarding apprenticeship, courts have generally held that state laws which affect or otherwise relate to apprenticeship training, including the modification of a program's standards, are within the scope of ERISA preemption.[19] In *Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 112 L. Ed. 2d 46 (1990), a California public works contractor was subject to penalties and disbarment from bidding on future state public works because it did not follow state law on a specific project which mandated that all contractors subscribe to an apprenticeship program, utilize apprentices in a set ratio to journeymen hours, and contribute a per hour amount to the fund. The state law was found preempted because it forced the contractor to involuntarily join and fund an employee welfare benefit plan. Similarly, in *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), *cert. denied*, 120 L. Ed. 2d 887 (1992),

19. The program's standards establish an apprentice's course of training, the number of hours needed to be spent on various work processes, and a progressive wage scale which is commensurate with the skill levels obtained.

a Minnesota law establishing a minimum jobsite ratio for apprentice pipefitters, whereby a contractor was required to use one journeyman for the first apprentice and three additional journeymen for each additional apprentice, was held preempted by ERISA because the law was designed to affect employee welfare benefit plans by essentially mandating a "minimum" benefit.

B. Apprenticeship Programs Are Employee Welfare Benefit Plans As Defined By ERISA.

The threshold question in this action is whether an apprenticeship program is an employee benefit welfare plan covered by ERISA. The plain text of ERISA is crystal clear. Section 3(1), 29 U.S.C. § 1002 (1), expressly defines the term "employee welfare benefit plan" to include (emphasis added):

> *any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries*, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Federal and state courts which have applied this section when determining the validity of state apprenticeship laws have universally found apprenticeship programs to be employee welfare benefit plans governed by ERISA; there has been no finding of an artificial separation between the "funding" mechanism for a program and the actual plan for providing on-the-job training, progressive wages, and supplemental classroom instruction.[20] In *Hydrostorage*, *supra*, 891 F.2d at 727-729, the Ninth Circuit first considered whether apprenticeship standards, those subject to approval by the CAC and California's Division of Apprenticeship Standards ("DAS"), are ERISA-protected employee welfare benefit plans. After reviewing the extensive and comprehensive nature of such standards, which include the duties and procedures of the apprenticeship committee, the minimum qualifications of apprentices, the maximum ratio of apprentices to journeymen on job locations, the terms and conditions of apprenticeships, the hours and wages of apprentices and provisions for supplemental (classroom) instruction and periodic examinations, the Court of Appeals concluded that the standards were undeniably "an integral part" of a larger program, as defined in 29 U.S.C. § 1002(a), for the purpose of providing for its participants . . . apprenticeship or other training programs. 891 F.2d at 728. *See also Boise Cascade*, *supra*, 939 F.2d at 637; *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, 1558 (10th Cir. 1992),

20. Amici defines "apprenticeship program" as a course of job training which meets the criteria of 29 C.F.R. Part 29, whether or not the program is approved by the United States Department of Labor, Bureau of Apprenticeship and Training or a State Apprenticeship Council. As a covered ERISA plan, a program must comply with all applicable laws regulating disclosure and fiduciary responsibilities. If a program is not providing adequate training, a "sham" program, it can be sued by either the Secretary of Labor or the apprentices (the beneficiaries) under the provisions of 29 U.S.C. § 1132, disapproved for federal public works by the federal Wage-Hour Division Division of the United States Department of Labor or enjoined from operation by the Secretary of Labor through the Pension, Benefits and Welfare Plan Administration of the United States Department of Labor.

cert. denied, 121 L. Ed. 2d 331 (1992); *Joint Apprenticeship and Training Counsel of Local 363 v. New York State Dept. of Labor*, 984 F.2d 589, 591 (2nd Cir. 1993); *Southern Calif. Chpt. of Associated Builders and Contractors v. California Apprenticeship Council*, 4 Cal. 4th 422, 436-440 (1992).

There is no justifiable basis to remove any aspect of an apprenticeship program from ERISA's coverage. First, as recognized by this Court, apprenticeship training cannot be viewed together with ordinary conditions of employment subject to state regulations. In *Morash*, *supra*, 490 U.S. 107, this Court held that an employer's policy of paying its discharged employees for unused vacation time does not constitute an employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1). The Court found that unused vacation pay that would come directly out of the employer's general assets is beyond ERISA's reach because such a benefit is fixed, such as regular wages, and an employee's right to these benefits does not depend upon a future occurrence or subject an employee to a risk different from his/her ordinary employment risk. *Morash*, 490 U.S. at 115-117. The Court then expressly stated that unused vacation pay is directly distinct from other benefits, such as an apprenticeship program (*id.* at 115-116, emphasis added):

> Section 3(1) [29 U.S.C. § 1002(1)] subjects to ERISA regulation plans to provide medical, sickness, accident, disability, and death benefits, *training programs*, day care centers, scholarship funds, and legal services. The distinguishing feature of most of these benefits is that they accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee.

Apprenticeship programs subject an employee to risks far different from those encountered in "ordinary" employment. For

example, by the imposition of a graduated pay scale consistent with skills acquired by the apprentice, not with the actual job performed (*see* 29 C.F.R. § 29.5(b)(5)), apprentices may find themselves paid at a different rate than other employees performing comparable work. "In order for ... an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training." *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991), *cert. denied*, 120 L. Ed. 2d 869 (1992). Further, apprenticeship standards require related and supplemental instruction beyond the requisite on-the-job training, periodic testing of acquired skills, and a mechanism to transfer apprentices to insure continuous employment and training in all work processes. *See* 29 C.F.R. § 29.5(b) (4), (6), and (13). Confronted with these comprehensive standards and their mandates, an apprentice is thus subjected to risks far beyond that of seeking entitlement to vested benefits, such as unused vacation pay, which are normally associated with "ordinary" employment. This fact was recognized by the California Supreme Court in *Southern Calif. Chpt. of Associated Builders and Contractors v. California Apprenticeship Council*, *supra*, 4 Cal.4th 422, 440:

> We believe that it is obvious that an apprentice incurs a risk different from the risk of ordinary employment. The apprentice agrees to accept lower pay and to complete certain educational requirements in order to learn skills which will eventually lead to recognition as a journeyman. If the apprenticeship program goes out of business or if the apprentice is expelled from the program, his investment in the training may be for naught.

Further, there is no regulation issued by the Secretary of Labor which removes an apprenticeship and/or training program

from coverage under ERISA. 29 C.F.R. § 2510.3-1, which is meant to "clarify the definition of the terms 'employee welfare benefit plan' and 'welfare plan' for the purposes of title I of [ERISA]" does not list apprenticeship training as an employment practice which is excluded from ERISA coverage. Correspondingly, 29 C.F.R. § 2510.3-3, which defines "employee benefit plan," states that (emphasis added) "the term 'employee benefit plan' shall not include any plan, fund or program, *other than an apprenticeship or other training program*, under which no employees are participants covered under the plan. . . ." In fact, 29 C.F.R. § 2520.104-22, which exempts apprenticeship and training programs from various ERISA disclosure requirements, expressly refers to apprenticeship programs as employee welfare benefit plans. Considering the express wording of ERISA, the interpretation of the statute by the courts, and the regulations of the Secretary of Labor, it is clear that apprenticeship programs, regardless of approval, are employee welfare benefit plans covered by ERISA. The next step, therefore, is to determine whether the California Prevailing Wage Law at issue, Cal. Labor Code § 1777.5, relates to or has a connection with ERISA plans and is therefore subject to preemption.

C. The California Prevailing Wage Laws Specifically Relate To, And Purport To Regulate, And Does Regulate, ERISA Plans.

Clearly, if a state law relates to an employee welfare benefit plan, using the word "relate" according to its ordinary, dictionary meaning, then preemption naturally follows. *See Greater Washington*, *supra*, 506 U.S. at 129-130. A state law relates to an ERISA plan if it singles out an ERISA plan for preferential treatment over another ERISA plan. *See Mackey v. Lanier Collection Agency & Svc., Inc.*, 468 U.S. 825, 830 (1988) (state garnishment exemption statute which protected ERISA welfare benefit plans from garnishment while exposing non-

ERISA plans to garnishment *singled out* the plans for different treatment and was thus preempted).

California's prevailing wage scheme, which singles out state-approved apprenticeship programs for favorable treatment (the payment of lower apprentice wages on public works), clearly "relates to" apprenticeship or other training programs and is therefore subject to ERISA preemption. This is no mere incidental or accidental regulation; the statute purposefully attempts to control an employee benefit plan (*i.e.*, rewards the "good" plans and punishes the "bad" plans).

As correctly determined by the Ninth Circuit, this action is indistinguishable from *National Elevator*, *supra*, 957 F.2d 1555. There, the Tenth Circuit held that an Oklahoma prevailing wage ruling, which required that elevator construction "helpers," a classification created under a series of nationwide collective bargaining agreements (NEIEP), be enrolled in a certified BAT apprenticeship program in order to receive a lower apprenticeship wage on state public works projects, was preempted by ERISA. After reviewing federal court opinions dealing with apprenticeship regulation and ERISA, the court determined that the ruling, a state law under ERISA (29 U.S.C. § 1144(c)), was not one of general application and subject to ERISA preemption:

> We accept, as a general proposition, the state's right to regulate wages. But a wage law that provides an option favoring certain ERISA plans and benefits (BAT approved plans) over other ERISA plans and benefits (NEIEP) is not a law of "general application" and may be used to effect change in the administration, structure, and benefits of an ERISA plan. If a state is permitted to use a prevailing wage scheme to single out and

> favor certain ERISA plans over other ERISA plans, the potential for abuse is great — a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans. We believe that defendants' ruling would discourage non-BAT approved ERISA training programs and encourage changes to NEIEP, a national employee benefit program. 957 F.2d at 1561.

The Tenth Circuit further found that the Fitzgerald Act, 29 U.S.C. § 29, did not save the Oklahoma from ERISA preemption because the Fitzgerald Act "merely seeks to facilitate development of apprenticeship programs — it does not mandate apprenticeship programs or seek to discourage other training programs. [footnote]." *Id.* at 1561-1562; *See also, Hydrostorage*, *supra*, 891 F.2d 719, 730-731.

California prevailing wage laws, specifically Labor Code § 1777.5, have a similar intent and effect as the Oklahoma ruling. The laws providing for the apprentice wage exemption cannot be considered "general application" laws because they expressly favor certain ERISA plans (those approved by the CAC) over other ERISA plans (for example, BAT approved apprenticeship/ trainee programs). The state laws as written and applied thus discourage any training or proposed apprenticeship program that does not conform to CAC's regulations. The unapproved apprenticeship program at issue in this action was identical to a previously approved program, except that it switched from one union sponsor to another, thereby "losing" its approval. It was approved months later with no changes.[21]

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21. Delay of the state approval process for years is one of the common tactics used to discourage new programs. The apprenticeship program in *So. Cal. ABC*, *supra*, 4 Cal. 4th 422, took approximately five years before it was finally approved, while the Washington state program which was the subject (Cont'd)

The assertion that Cal. Labor Code § 1777.5 applies only to contractors and not to apprenticeship programs is ludicrous, since the statute expressly states which apprentices are "eligible" on public works:

> Only apprentices . . . who are in training under apprenticeship standards and written apprentices agreements under Chapter 4 (commencing with Section 3070) of Division 3 [from CAC approved programs], are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

Of course this is regulation. A program is approved by the CAC must alter the progressive wage scales found in the standards. When apprentices performing public works and are required to be paid the State prevailing journeyman rate, program content is being regulated by reward and punishment.

The coerced modification of programs, altering wage and benefits in the standards when their apprentices work on public projects, is in direct contradiction to the purposes of training. "In order for . . . an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training." *MacDonald*, 949 F.2d at 274. The prevailing wage laws thus dictate reporting requirements for BAT programs, showing that journeyman wages are being paid, but also directly regulate the amount of benefits to be paid under and ERISA plan. On public works, BAT programs must not pay its trainee according to the standards, but according to the state-

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(Cont'd)
of the antitrust suit in *Forrest*, *supra*, was finally approved by order of the Ninth Circuit seven years late. *See, e.g., Inland Empire*, *supra*, 78 F.3d 593.

determined prevailing wage. Laws of this nature have been expressly found to be subject to ERISA preemption. *See General Electric Co. v. Department of Labor*, 891 F.2d 25, 29-30 (2nd Cir. 1989) (ERISA preempts state law which requires type and amount of employer contribution to ERISA plan and rules under which plan will operate).

Further, Cal. Labor Code § 1777.5 has been found to regulate and/or relate to ERISA plans because the statute allows the state to enforce the terms of an ERISA plan (the existing state-approved program). In *Hydrostorage*, *supra*, 891 F.2d 719, the court ruled that even though the California statute was in aid of the existing apprenticeship program, the statute was an enforcement scheme which was not permitted under ERISA. *Id.* at 728-730. According to the court:

> The very purpose of requiring Hydrostorage to apply was so that Hydrostorage would become bound by the Standards, an ERISA plan . . . . Thus, the order undoubtedly, "relates to" an ERISA plan in the sense that the order has a "connection with or a reference to" the Standards.

Likewise, in *J.A. Jones*, *supra*, 846 F.2d 1213, the Ninth Circuit held that ERISA preempts a state statute requiring employers on state public works projects to make contributions to employee benefit plans at or above the "prevailing" wage rate, regardless of the level set by an employment contract or collective bargaining agreement. In *J.A. Jones*, the Local Union's Apprenticeship Fund brought an action, based on a Washington state statute, for the difference between the employer contributions to a national apprenticeship training fund at rates set by a collective bargaining agreement with a national union, and the minimum level established by state law.

The holding of preemption in *J.A. Jones* confirms that a state cannot discriminate against particular apprenticeship programs where one program is "state" approved and the other is not, nor can a state mandate payment levels to the training program as part of its prevailing wage law. Thus, the State of California cannot force non-CAC approved ERISA programs to use journeyman prevailing wage rates for apprentices and trainees while allowing state-approved programs to pay less than prevailing journeyman wage rates.

Unlike most other employee benefit program, the wages paid apprentices are part of the standards and constitute an essential term of the benefit. An apprenticeship or training program which meets the criteria of 29 C.F.R. Part 29 must provide a progressive, graduated wage rate commensurate with the skill level of the apprentice. Thus, to supersede with its prevailing wage laws the wage rates which is part of the benefit program contained within the standards, the State of California is regulating the training as well as the benefits of a program's participants. These laws undeniably relate to and regulate ERISA-protected plans and are subject to ERISA's broad preemption provision.

Assuming, *arguendo*, that the California Prevailing Wage Laws do not "relate to" ERISA plans, they certainly have a "connection with ERISA plans, such that preemption must apply. As stated in *Blue Cross*, "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objective of the ERISA statute as a guide to the scope of the state law that Congress understood to survive." *Blue Cross*, 115 S. Ct. at 1677.

Under this review, it is clear that Congress intended ERISA to preempt state law regulating apprenticeship which are not authorized by the Fitzgerald Act. Following the decision in *Hydrostorage*, and subsequent appellate cases ruling that states

go beyond the criteria found in the Fitzgerald Act when approving apprenticeship programs (*see, e.g., MacDonald*, 949 F.2d 270), bills were introduced in Congress to amend ERISA such that state apprenticeship and prevailing wage laws would be specifically excluded from ERISA's preemptive reach.[22] In fact, the adversity encountered by Amicus Walther Electric Company during the company's attempt to become approved by the CAC was read into the Congressional Record by Congressman Ballenger of North Carolina. *See* H.R. 1036, 103 Cong. 1st Sess., 139 Cong. Rec. 8965-8966. However, no legislation ever came out of Congress amending ERISA in the manner. Clearly, if it was the intent of Congress to exclude apprenticeship programs from ERISA's coverage, then Congress would have passed the amendment to specifically exclude state apprenticeship and prevailing wage laws from ERISA's reach. The actions of Congress in this regard clearly indicate that ERISA preemption extends to the state law at issue in this case.

II.

CALIFORNIA'S PREVAILING WAGE LAWS ARE NOT SAVED FROM ERISA PREEMPTION.

State laws which are subject to ERISA preemption can still be deemed valid by operation of ERISA's " savings clause," 29 U.S.C. § 1144(d), which provides that "nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." There is no federal law which allows California's scheme for enforcing its prevailing wage laws to be "saved" from ERISA preemption.

Regarding apprenticeship, the only federal act which arguably can protect prevailing wage laws is the Fitzgerald Act,

22. Attached hereto as Appendix D and E, respectively, are the texts of H.R. 1036 and S. 1580.

29 U.S.C. § 50. Congress enacted the Fitzgerald Act in 1937 in order to protect apprentices by establishing minimum labor standards, promoting apprenticeship as a system of training skilled workers and encouraging the federal government to cooperate with state agencies in formulating apprentice standards. The Fitzgerald Act regulations, found at 29 C.F.R. Part 29, provide for a dual system for federal and state approval of apprenticeship programs, and establish minimum criteria a proposed program must meet in order to be approved. *See* 29 C.F.R. § 29.5. The Regulations also provide the means for de-registering a program should it fail to maintain the minimum approval standards. 29 C.F.R. § 29.7, and for recognizing State Apprenticeship Councils (such as the CAC) as the Secretary of Labor's "agent" to determine whether an apprenticeship program conforms with federal standards. 29 C.F.R. § 29.12.

"[A]ny state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by . . . ERISA." *MacDonald*, 949 F.2d at 274. There is no Fitzgerald Act regulation or corresponding federal law which allows for California to enforce its prevailing wage on behalf of those in non-approved training programs. As stated by the Ninth Circuit in *Hydrostorage*, the Fitzgerald Act only sets forth regulations governing the eligibility for federal registration; it is not an enforcement mechanism for federal law. 891 F.2d at 731. It must be noted that the Fitzgerald Act only delegates the power of registration to the applicable State Apprenticeship Council. In this respect, it is only the CAC which is delegated the authority by BAT to regulate apprenticeship training in the State of California, not the Department of Industrial Relations or Labor Commissioner which enforces prevailing wage laws. As noted, a progressive wage scale is an intregal component of an apprenticeship program's standards. *See* 29 C.F.R. § 29.5(5), Title 8, Cal. Code of Regulations § 212(c)(7). The CAC and the State can only regulate wages by means of approving a

progressive wage scale in the program's standards during the registration process; there is absolutely no authority for the CAC to re-delegate authority to the Director of California's Department of Industrial Relations or the Division of Labor Standards Enforcement to either determine the apprentice wage or act as the enforcement arm of the CAC to enforce apprentice wages. Essentially, the Fitzgerald Act can operate and fulfill its purpose independently from the California prevailing wage laws. On this basis, the state laws cannot be saved from preemption. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 101 (1983).

Further, while the State of California may have a traditional state interest regarding wages paid to workers, there is no "traditional" state interest concerning the payment or availability of benefits. The use of benefits in determining the payment of prevailing wages has been a fairly recent occurrence. For instance, the Davis-Bacon Act, 40 U.S.C. § 276a, required only a straight wage rate until 1964, when fringe benefits, including medical or hospital care, workmen's compensation, unemployment benefits, pensions, vacation pay, and "other bona fide fringe benefits . . . not required by other Federal, State, or local law" were included in the determination of the prevailing wage. Act of July 2, 1964, Pub. L. No. 88-349, 78 Stat. 238 (1965). In California, fringe benefits were not included in the determination prevailing wage rate until 1959, with the enactment of Calif. Labor Code § 1773.1. However, the State has never mandated that employers, in general, provide benefits to their worker and has never taken an interest, traditional or otherwise, as to the amount or type of benefits provided.[23] By

23. While the recent decision by the Ninth Circuit in *WSB Electric, supra*, is consistent with the Third Circuit's opinion in *Keystone Chpt. of Associated Builders and Contractors v. Foley*, 37 F.3d 945 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995) and the Eighth Circuit's opinion in *Minnesota Chpt. of Associated Builders and Contractors v. Minnesota Dept.*

(Cont'd)

expressly including apprenticeship and training programs within ERISA's coverage in 1974, Congress has formally recognized the providing of training benefits as a matter of exclusive federal concern to the exclusion of state regulation. The California Prevailing Wage Laws at issue in this case impermissibly intrude on the federal law.

CONCLUSION

For the reasons stated above and in the Respondent's Brief, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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(Cont'd)
of Labor and Industry, 47 F.3d 975 (8th Cir. 1995), it is inconsistent with the Ninth Circuit decision in this case, and incorrectly decided, since there is no traditional state interest in regulating benefits. Prevailing wages should not contain minimum or maximum benefit requirements and should adopt either a "total package" concept as does the federal prevailing wage law or a "base wage only" rate policy as does state minimum wage laws of general applicability. *See General Electric, supra*, 891 F.2d 25.

APPENDIX A — LETTER DATED APRIL 7, 1993

THIERMAN LAW PARTNERSHIP
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April 7, 1993

Chairman and Members of the
United States House of Representative
Committee on Labor-Management Relations
United States House of Representative
Capitol Building
Washington, D.C.

Dear Mr. Chairman and Honorable Committee Members

On behalf of myself and the National Association of Manufacturers (NAM), I would like to thank you for allowing me to address the subcommittee during its March 24, 1993 hearing on HR 1036. As I stated, I represent many organizations with vested interest in the future of apprenticeship training. These include the Southern California Chapter of Associated Builders and Contractors Joint Electrical Apprenticeship Committee, which I represented in the enclosed case, as well as several AFL-

CIO Joint Apprenticeship Committees. The purpose of this letter is to provide for the hearing record, a supplement to my testimony and copies of the legal authorities mentioned at the hearing.

First, let me repeat that NAM seeks to maintain ERISA's expansive preemption provision, 29 U.S.C. § 1144(a), because its member must function under uniform rules throughout the United States for all types of employee benefits. If there are problems with specific rules, or in varied instances, the lack of rules, we suggest the matter be addressed and resolved by the appropriate federal agency, regarding apprenticeship, this is the United States Department of Labor, Bureau of Apprenticeship and Training. We do not believe the matter should be delegated to State and Local authorities who impose inconsistent rules, or give "favored, local employers" special status based on political or inappropriate influences. Like the other witnesses who appeared before you, NAM endorses the concept of a level playing field so that business is not encouraged to leave existing facilities simply to find a more favorable regulatory environment.

Second, NAM seeks to expand and strengthen apprenticeship training by developing national standards for excellence in apprenticeship. NAM agrees with the position of the United States Court of Appeals for the Ninth Circuit in *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 120 L. Ed. 869 (1992), which clarifies and severely limits the prior decision of the same court in the case of *Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 112 L. Ed.2d 46 (1990). I have enclosed a copy of the MacDonald case which has been followed by the United States Court of Appeals

for the Second Circuit in *Apprenticeship and Training Council of Teamsters Local 363 v. New York State Department of Labor*, 984 F.2d 589 (2d Cir. Jan. 27, 1993) (copy also enclosed) which clearly allows States to regulate apprenticeship consistent with federal law pursuant to the National Apprenticeship Act, 29 U.S.C. § 50, commonly known as the Fitzgerald Act, and its implementing regulations found at 29 C.F.R. Part 29.

While NAM agrees with many of the goals behind this legislation, NAM also believes that HR 1036 as drafted actually works against training, against minority participation in apprenticeship, and against the interest of construction contractors who maintain employee benefit plans. I am enclosing for your review the findings and recommendations of California's Little Hoover commission in their January 22, 1992 report, addressed to California's Director of the Department of Industrial Relations, on minority access to existing apprenticeship programs. In addition to the conclusion of the report, which states that efforts to increase apprenticeship participation among minorities and females in the construction industry are hampered by the lack of new programs. I want to point out that the Chairman of the Commission was Nathan Shappel, a union signatory contractor from Southern California.

NAM believes the framework for creating a national standard for excellence in apprenticeship has been provided both in the MacDonald decision, and in the most recent decision of the California Supreme Court in *Southern California Chapter of Associated Builders and Contractors v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (Dec. 24, 1992) (copy enclosed). In both these cases, the Courts held that the federal government, through the Secretary of Labor, establishes the standards for apprenticeship program approval

and delegates to the States, through State apprenticeship councils, the authority to implement and administer the federal guidelines. Relying on the Fitzgerald Act's mandate of federal/state cooperation in apprenticeship, the Court in *So. Cal. ABC* ruled that ERISA does not preempt state regulation of apprenticeship program approval provided that the regulations are necessary to enforce the Fitzgerald Act and are consistent with federal purposes. State laws which are separate and independent from the Fitzgerald Act, imposing inconsistent approval criteria, are preempted. NAM believes this position is the correct state of the law on ERISA preemption. Currently, California is amending its prevailing wage and apprenticeship laws to reflect the *So. Cal. ABC* ruling (copy of draft interpretive bulletin enclosed). Should Congress feel the need to clarify its position in this regard, the California Supreme Court's view should be codified by Congress as a workable sclution consistent with ERISA preemption and the Fitzgerald Act's requirement of a national apprenticeship system administered through state agencies.

In its present form, the proposed HR 1036 not only removes the Fitzgerald Act exemption to ERISA, but it also fails to address the real issue presented in *Hydrostorage*, which was a funding issue more than a program issue. In *Hydrostorage*, the contractor was being forced by State law to join and contribute to the state-approved union apprenticeship program, rather than encouraged by ERISA tax incentives to either join or establish its own state-approved program. If HR 1036 is passed without change, contractors may potentially be required to join and fund as many ERISA plans, with varying terms and conditions, as the number of states in which they work. This result does not serve the main purpose behind the enactment of ERISA uniformity of the employee benefits law.

In its present form, HR 1036 also punishes construction contractors, mostly union contractors, who provide cost-efficient benefits to their employees through uniform, nationwide employee benefits plans. Rather than attempt to repeal the Second Circuit's decision in *General Electric Co. v. New York State Department of Labor,* 891 F.2d 25 (2d Cir. 1989), which held that New York could not require a contractor to make up the difference between the cost of each of its ERISA plans and the cost of each of the "prevailing" benefit plans, NAM believes that employees would be better served if HR 1036 compared the contractor's total package — i.e., wages and benefits — with the total "prevailing" package.

Additionally, benefits should be compared either on an "actual benefit" basis or a "cost" basis. ERISA was enacted to promote the establishment of cost-efficient, nationwide benefit plans unencumbered by varying state or local requirements. HR 1036 undermines this laudable ERISA goal by ignoring the actual value to the employee of the benefit package and focusing solely on its cost. This has the perverse effect of rewarding contractors who have high costs (but low actual benefits) and punishing contractors who provide a high level of benefits on a cost-efficient basis. At a time when our nation is attempting to control the aggregate level of health care costs and provide adequate health care at a reasonable cost, Congress should not be creating disincentives for employers to attain precisely this result.

On the matter of mechanics liens, we oppose any one who does not pay the contractually agreed upon costs of providing benefits. We believe that appropriate remedies should be available. Because employee benefit plans exist and continue due to federal law, we believe that any necessary additional

remedies for the collection of contributions to multi-employer benefits plans should be consistent and a part of the federal ERISA. Further, in order to encourage our members to employ contractors who provide benefits, the amount of any third party liens should be strictly limited to the express contractual payment due the contractor from the owner.

If the Committee or any member thereof, would like further discussion or exact language to implement these suggestions. I would be most happy to respond. Thank you for your kind attention and courtesy at the hearing.

Very truly yours,

s/ MARK R. THIERMAN
Mark R. Thierman

Enclosures:

January 22, 1992 Little Hoover Commission Report of Denial of Minority Participation in California's Union Apprenticeship Programs.

United States Court of Appeals Decision in *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 120 L. Ed.2d 869 (1992).

California Supreme Court Decision in *Southern California Chapter of Associated Builders and Contractors v. California Apprenticeship Council* 4 Cal. 4th 422 (1992)

California's New Regulations Adopting State Prevailing Wage Law to Federal Standards

APPENDIX B — MEMORANDUM DATED OCTOBER 12, 1995

State of California
Department of Industrial Relations
Memorandum

455 Golden Gate Avenue, Suite 3220
San Francisco, CA 94102
(415) 703-3850
FAX No. (415) 703-5460

Date: October 12, 1995

To: Rulon Cottrell, Chief — DAS
Victoria Bradshaw, Labor Commissioner

From: s/ John M. Rea
John M. Rea, Chief Counsel
Fred D. Lonsdale, Sr. Counsel
Administration, OD-Legal
Department of Industrial Relations

Subject: Legal Guidance Concerning The Effect of *Dillingham*

The Director has asked that we, in consultation with DLSE's Chief Counsel, Tom Cadell, respond to your requests for legal guidance concerning the effect of *Dillingham Const. v. County of Sonoma* (9th Cir. 1995) 57 F.3d 712, on the work of the Division of Apprenticeship Standards and the Division of Labor Standards Enforcement. This memo will set forth the limits it places on Department policy and is intended to facilitate development of specific practical enforcement policies by each Division.

Appendix B

I. *Introduction.*

In *Dillingham*, the Court preempted the application of the prevailing wage law which denied the lower apprentice rate on public works to employees of a contractor who was participating in a collectively bargained joint apprenticeship program which had not yet been given final state approval. Unless reversed by the United States Supreme Court, this decision changes the legal effect of Labor Code section 1777.5.

Dillingham found that Labor Code section 1777.5's restriction of the exception to the prevailing wage law, allowing contractors to pay the lower apprentice per diem wage only to apprentices in state approved programs, discouraged participation by contractors in unapproved apprenticeship plans (some of which were covered by ERISA), and encouraged participation in state approved apprenticeship plans. Thus, the Court held, this restriction in the prevailing wage law "relates to" ERISA apprenticeship plans and was preempted.

In response to a California Supreme Court decision,[1] DAS and DLSE had taken the position in your July 1993 Enforcement Bulletins that, so long as the program approval rested on factors required by the cooperative relationship to enforce and promote federal standards of the National Apprenticeship (Fitzgerald) Act and Department of Labor rules under that Act, there was no preemption of the provisions of Labor Code section 1777.5.

1. *So Cal. ABC v. CAC* (1992) 4 Cal. 4th 422, 14 Cal.Rptr.2d 491.

Appendix B

Some segments of your regulated public have counseled ignoring *Dillingham* to the extent it is inconsistent with *So Cal. ABC* because they believe that preemption of section 1777.5 would "impair" the approval function because it would compel the state to treat an unapproved program as though it had met the criteria for approval, thus making the standards for approval meaningless. In addition, by removing an incentive for programs to comply with the Fitzgerald Act requirements, nearly half a century of the Congressional direction to encourage the inclusion of such standards in contracts of apprenticeship would be undercut. Finally, by giving potential advantage to those contractors who are not engaged in serious training, *Dillingham* would hinder bona fide apprenticeship programs which depend on public works to provide thousands of on-the-job training hours needed to produce a trained journey level employee.

However correct these arguments are, our legal advice is that DIR is obliged to follow the rule of the Ninth Circuit, which covers California (although there is a conflict with other federal circuits on this point[2]). Thus, as we discuss more fully below, *Dillingham* has determined that section 1777.5's lower apprentice rate can be paid by contractors to all apprentices in programs sponsored by plans covered by ERISA, even where there has been no program approval.

Because *Dillingham* applies ERISA preemption only to

2. DIR has been given permission by the Governor's Office to petition the Supreme Court to review *Dillingham*.

state laws requiring prevailing wages, a contractor's opportunity to pay lower rates may vanish if the source of funding for the public works job is not purely state, but partly federal. California approval of apprenticeship programs still functions as the approval for federal purposes, and the federal prevailing wage law, "Davis-Bacon," permits the contractor to pay lower wages only to apprentices in *approved* programs.

II. *All Construction Workers Who Are (1) Apprentices, And (2) Participants In An Approved Or ERISA Covered Apprenticeship Program Can Be Paid The Apprentice Rate On State Public Works. Their Program Need Not Be "Approved" Or "Registered" With Either The State (DAS) Or Federal (BAT) Governments,* ***Unless*** *The Job Is Also Subject To Federal Prevailing Wage Laws.*

A contractor judging what to pay apprentices on a public works job, or a program coordinator assessing whether the correct wage rates have been paid, now faces the complexity of three possible variations on what used to be a simple legal requirement to pay a single apprentice rate, determined from a single source, in all circumstances:

a) On a job funded solely with federal money, which is subject to Davis-Bacon prevailing wage requirements, only California (or where applicable, BAT-registered apprentices[3]) may be

3. BAT has restricted direct BAT approval of apprentices programs in (Cont'd)

paid less than the journey level rate. That rate would be based on the percentage progression found in the apprentices' program's standards. As is now the case, only the federal Department of Labor, or its agents, would enforce that requirement.

b) On a job funded solely with state money which is subject to Labor Code section 1777.5 requirements, any apprentices participating in an apprenticeship program, which is either an approved program or one covered by ERISA, may be paid less than the journey level rate. For the contractor paying the lower rate, the method of showing that such workers are apprentices is no longer restricted to showing that the program which they are in is one registered with California. Likewise, the plan in which they participate does not need to be approved by California or the federal BAT. It must, if not approved, be covered by ERISA.

c) On a job funded with both state money and federal money — that is both within state Labor Code section 1777.5's requirements *and* federal Davis-Bacon prevailing wage requirements — the

(Cont'd)
California to a small number of programs on Indian and military reservations. Apprentices indentured to an employer in a BAT state outside California may be employed by that employer on a California project, subject to any limitations in the BAT approved standards. Except for these very unusual situations, all other apprentices would be in California approved programs.

situation is generally the same as on projects funded with only federal money: Only apprentices in approved programs may be paid less than the journey level rate specified in the Davis-Bacon wage determination. That federal rate would be based on the percentage progression found in the apprentices' standards. Enforcement of such a rate would be by the federal Department of Labor or its agents and not by California.[4] What changes because of *Dillingham* is that California would enforce the state journey level rate only where the person paid the apprentice rate is not an apprentice or is an apprentice but not participating in a plan covered by ERISA.[5]

III. *Other Results Of Dillingham On Other Apprenticeship Laws.*

1. *The Program Approval Function.*

A portion of the regulated public has offered, and we reject, the reading of *Dillingham* which would find ERISA preemption of any mention of apprenticeship in state law on the theory that any mention of apprenticeship "relates to" an ERISA plan in some way. Such a broad reading would

4. Except where the state per diem apprentice rate is higher than the federal Davis-Bacon rate, in which case the DIR would enforce this higher rate.

5. *Dillingham* relies on the ERISA preemption clause, and that only protects ERISA-covered plans from state laws.

preempt both section 1777.5's recognition of an exception to the per diem prevailing wage for apprentices on public works, and the authority to approve apprenticeship or other programs in sections 3070 et seq. Both readings have been offered, based largely on *Dillingham's* seemingly expansive reading of "relate to" and its citation of a case[6] invalidating a Georgia statute which singled out ERISA covered plans for favorable treatment.

We reject the premise that *Dillingham* invalidates any state law exception to the prevailing wage law which would allow contractors to pay apprentices less than the prevailing wage. We reached this conclusion because *MacDonald*,[7] another earlier case by the Ninth Circuit, pointed out that in the building trades:

> In order for such an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training. Prevailing wage statutes for public works thus present a significant obstacle, unless apprenticeship programs are exempted. *Id.* at 274.

A state prevailing wage law that *allows no apprentice exception* could be attacked as "a

6. *Mackey v. Lanier Collection Agency* (1988) 486 U.S. 825.

7. *Electrical Joint Apprenticeship Comm. v. MacDonald* (9th Cir. 1991) 949 F.2d 270.

significant obstacle" to ERISA plans which offer apprentices to contractors for the reasons given in *MacDonald*. A prevailing wage law that *grants* an *apprentice* exception could be challenged as "relating to" ERISA plans. Given a situation in which ERISA preemption could be argued in either case, the clearest guidance from the Court seems to be the statement in *MacDonald* that an exemption is essential for apprenticeship to work. This reading is reinforced by the fact that *Dillingham* did not hold that all of section 1777.5 was preempted only the restriction of the exception to contractors employing apprentices in approved plans and denial of the lower wages to contractors employing apprentices in unapproved plans.

Invalidation of any state law which mentions apprentices and apprenticeship program approval was not the subject of *Dillingham*. *MacDonald*, however, clearly held that the state's approval function was not preempted so long as the criteria for approval did not change the requirements of the Fitzgerald Act or its regulations. Although it is difficult to square the reasoning of *Dillingham* with the reasoning of *MacDonald*, *Dillingham* did not purport to overrule *MacDonald*'s holding that there are parallel tracks for federal and state approval of apprenticeship programs. *Dillingham* simply found that the *MacDonald* holding (that the state approval process was not preempted by ERISA) did not decide the issue before it, which it characterized as a state's application of the prevailing wage law, not a state's use of its

apprenticeship program approval authority. Since state approval or disapproval of apprenticeship programs is relied upon by the federal Department of Labor's BAT and Wage Hour Division in enforcing federal wage requirements on Davis-Bacon public works, and *Dillingham* did not present the Davis-Bacon issue, the reading the Department adopts is that its authority to continue with approval functions is not preempted.

The law concerning apprenticeship must take into account many, sometimes conflicting, policies. The balance must eventually resolve conflicts in Federal policy and Congressional intent found in ERISA preemption, the ERISA clause saving certain laws from preemption, and the Fitzgerald Act, as well as policies from state apprenticeship law and state prevailing wage law. The difficulty of considering only ERISA preemption and pushing ERISA preemption to literal extremes has been noted by the United States Supreme Court in *New York State Conference of Blue Cross and Blue Shield v. Travelers* (1995) __ U.S. __, 115 S.Ct. 1671, where Justice Souter points out that, since all things are "related" in some way, an unreasonably broad and unthinking reading of ERISA preemption would eventually encompass all laws. We take the cautious approach taken by pre-*Dillingham* Ninth Circuit cases to be a partial recognition of this problem.

Appendix B

2. *The General Prevailing Wage Law Still Supplies The Wage Rates To Be Paid All Apprentices.*

Historically, the prevailing wage rates for apprentices were derived from "standards" which in turn always stated wages correlated to a period of progress in training. This "progressive schedule of wages" was required in the programs' standards by California as a condition of approval, for it is required by federal regulations under the Fitzgerald Act.

Thus, for apprentice plans which operate outside California approval, there may be no progressive schedule. The potential problem of public works jobs lacking applicable apprentice rates can be resolved by making trade-specific rates available to all employers who use apprentices from apprenticeship programs, including those not approved California but covered by ERISA. This approach will be most consistent with both Congressional and California legislative intent. The apprentice per diem wage rate can be determined by the Director through the Division of Labor Statistics and Research as a part of the process of setting the prevailing wage using the standard methodology set out in Title 8, California Code of Regulations, section 16200 et seq. for determination of the prevailing wage.

Appendix B

3. *Dillingham And Labor Code Section 1777.5's Ratio, Notice And Contribution Requirements.*

After *Dillingham*, we feel it appropriate to revisit the other mandates of section 1777.5. DIR last revised these mandates in light of a California Supreme Court case, *So Cal. ABC*,[8] in your two 1993 enforcement memos.

As you observed in 1993, the contribution requirement is not an obligation imposed on any ERISA plan. The state makes training funds available by offering, in section 1777.5, to pay for them as part of the bid costs on public works, and if they are not used for apprenticeship training in the crafts or classifications used on the job in the area of the public work, then they are to be returned to the state's general fund by deposit with the CAC. *Dillingham*'s principles suggest that DIR may have been improperly restricting the apprenticeship plans to which such funds could be paid. As an enforcement policy DIR should not pursue charges that an employer paid section 1777.5 apprenticeship funds to an *unapproved* apprenticeship program (which meets the statutory criteria for receipt) rather than returning them to the state via the CAC. Henceforth, any contributions to an apprenticeship plan which trains on California public works in an appropriate trade or craft, whether such plan is approved or not, meets section 1777.5's requirement.

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8. *So Cal. ABC, supra.*

The obligation to notify a local apprenticeship plan is likewise an obligation on a contractor, not on an ERISA plan. The contractor is not required to participate in any ERISA plan, and the plan is not required to take any action whatsoever. In keeping with the rationale discussed above, notice to any apprenticeship program, approved or otherwise, is all that should be required. This obligation will allow the apprenticeship community to continue to be apprised of ongoing public works and thus allow the apprentice program to offer their services to the contractor.

The final section 1777.5 obligation concerns the mandatory use of apprentices on public works projects, often called the ratio requirement. The mandatory use of apprentices is not to be confused with the other "ratio" often found in apprentice standards — the ratio of journey level workers to apprentices required for on the job training under the standards.[9] As to the minimum use ratio, following a narrow reading of *Dillingham*, DIR should continue to require employers to use apprentices on state public works projects. As the Court noted in *MacDonald*, apprentice training on public works is an essential component of apprenticeship. The state has an interest in having and building a trained work force. This interest resulted in the legislative mandate that apprentices

9. This "ratio" often sets a maximum number of apprentices per journey level worker. As to this "ratio" requirement, the state will continue, as it always has, to defer to the program standards.

be given on the job training on public works. This use of public funds for vocational education is a traditional state function.

We read *Dillingham* to say only that we may not pick and choose between ERISA covered apprentice programs to favor state approved programs, and thus when section 1777.5 and state contract provisions require the use of apprentices, that requirement can be met equally by apprentices from non-approved programs.

Conclusion

The Division of Labor Standards Enforcement and the Division of Apprenticeship Standards remain committed to fostering, promoting, and developing the interests of apprentices and of industry in the state. Formulating the specific program guidance to effectuate this within the limits of *Dillingham* will be challenging. The foregoing is as certain as we can be in assisting you in that effort, and in appraising the legal merit of suggestions which you have received from the regulated community.

JMR:FDL:clu
(cluhd-dir/das "Dill man memo/counsel-2")

APPENDIX C — LETTER DATED JULY 2, 1996

STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF APPRENTICESHIP STANDARDS
2424 ARDEN WAY, SUITE 160

PH: (916) 263-2877
FAX: (916) 263-0981

July 2, 1996

Mr. Robert H. Nambo, Executive Director
ACTA UAC
900 Fulton Avenue, Suite 240
Sacramento CA 95825

Dear Mr. Nambo:

The draft revision of standards and selection procedures submitted by ACTA have been reviewed and returned, not approved. The issues of concern to the DAS Program Planning & Review Unit follow.

Standards

1. *46 northern counties*: Santa Clara should be added and Santa Barbara should be deleted unless there are more than 46 counties and not all are in what is commonly referred to as Northern California,

2. An appendix or otherwise must be provided which outlines the obligations, rights, and general operating procedures. Sub-committee and main committee interface should be

addressed. Time frames are critical and need to be identified and in compliance with the California Code of Regulations (CCR), Sections 201 and 202.

3. *Related Instruction*: The original letter from was not a firm commitment. Affirm commitment letter is needed together with a year by year course outline of the related instruction, and describe how the related instruction will be addressed. How do UAC and Modesto Junior College propose to provide related instruction throughout Northern California? A clear description is needed, Please be sure to address all requirements of Section 3024 of the California Labor Code.

4. *Section 212, CCR*
Not all required items are addressed in the standards. All required items must be addressed.

5. *Wage Rates:*
Apprentice wage rates do not conform to CCR Section 208, Attached is a table for ready reference. The overtime provision is not acceptable. Is there a written understanding with all employees and employers? Public works wages: refer to Section 208(b).

6. Article XV - Ratio: CCR Title 8, Part I, Chapter 2, Sections 205(a), (1), (2).

Selection Procedures

1. Para 5(a): What type of proof - identify document(s).

2. Para 5(c): Medical exam Para required? By employers?

Appendix C

3. Para 5(d): LEAs in training area - are there other LEAs? Location of testing must be identified. What factors are considered in oral interview? Weight of factors? Passing scores?

4. Para 5(e): Ranking on other regional list - specify. How are tie scores broken?

5. Para 5(g): How will list of qualifieds be utilized to enhance compliance with affirmative action obligations (goals)? How many women are currently registered?

6. Para 6: Goals should be based on area of coverage, i.e., labor market area.

7. The reviewing unit has determined that your affirmative action plan is passive.

   a. Target protected group where deficiencies exist.

   b. Provide time frames to correct deficiencies.

   c. Specify how you intend to place women in your program.

Since you are requesting expansion of your area of coverage (labor market area) and in an area where similar programs exist, the requirements of CCR Sections 212.2 and 215 will apply, As you remember, the 212.2 process can consume a long period of time. Therefore, DAS recommends that additional requirements set forth in Section 212 and the additional requirements set forth in Section 208 be accomplished by a revision to approved standards, i.e., DAS-24.

Appendix C

Attached is a copy of suggested language for your standards text. The approval terminology for the DAS Chief should be as follows:

> the foregoing apprenticeship standards, being in conformity with the rules and regulations of the California Apprenticeship Council, the California Code of Regulations, and applicable federal regulations, are hereby approved _____ and become effective the day they become the order of the council,

The reviewer suggested that the selection procedures be separated from the actual standards in the form of an addendum to standards.

We have been advised that we may no longer accept for approval or registration employers outside your current approved area of coverage/labor market area or apprentice agreements for employers who are outside this area. Please call if you have any questions.

Sincerely,

s/ Albert M. Rojas
Albert M. Rojas
Apprenticeship Consultant

cc: Rod DeHart, President

APPENDIX D — HOUSE REPORT NO. 1036

103RD CONGRESS; 2ND SESSION
IN THE HOUSE OF REPRESENTATIVES
AS REPORTED IN THE HOUSE

H.R. 1036

1993 H.R. 1036; 103 H.R. 1036

SYNOPSIS:
A BILL To amend the Employee Retirement Income Security Act of 1974 to provide that such Act does not preempt certain State laws.

DATE OF INTRODUCTION: FEBRUARY 23, 1993

DATE OF VERSION: AUGUST 8, 1994 — VERSION: 6

SPONSOR(S):
Mr. BERMAN (for himself, Mr. FORD of Michigan, Mr. WILLIAMS, Mr. GUNDERSON, Mr. MILLER of California, and Mr. SHAYS) introduced the following bill; which was referred to the Committee on Education and Labor

JUNE 14, 1993

Additional sponsors: Mr. KILDEE, Mr. ENGEL, Mr. ANDREWS of New Jersey, Mrs. MINK, Mr. STRICKLAND, Ms. PELOSI, Mr. STARK, Mr. DIXON, Mr. WAXMAN, Mr. DELLUMS, Mr. ROEMER, Mr. REED, Mr. BECERRA, Mr. COSTELLO, Mr. PENNY, Mr. MANTON, Mr. KENNEDY, Mr. TUCKER, Mr. FILNER, Mr. OLVER, Mr. SANDERS, Mr. PETERSON of Minnesota, Mr. STOKES, Mr. YATES, Mr. HOLDEN, Mr. MAZZOLI, Mr. FAZIO, Ms. ROYBAL-ALLARD, Mr. VISCLOSKY, Mr. MCCLOSKEY, Mr. DURBIN, Mr. LANTOS, Mr. ROMERO-BARCELO 1, Mr.

Appendix D

ACKERMAN, Mr. BROWN of California, Mr. EDWARDS of California, Mr. MINETA, Mr. STUPAK, Mr. SKAGGS, Mr. MCDERMOTT, Mr. RAHALL, Mr. PALLONE, Mr. HAMBURG, Mr. DEUTSCH, Mr. KOPETSKI, Ms. ESHOO, Mrs. COLLINS of Illinois, Mr. JOHNSTON of Florida, Mr. BEILENSON, Mrs. CLAYTON, Mr. SABO, Mr. MOAKLEY, Ms. WOOLSEY, Mrs. UNSOELD, Mr. LAFALCE, Mr. MINGE, Mr. KLECZKA, Mr. KANJORSKI, Mr. SHARP, Mr. FINGERHUT, Mr. RIDGE, Mr. HINCHEY, Ms. LONG, Mr. BARLOW, Mr. LIPINSKI, Mr. MURPHY, Mr. KREIDLER, Mr. FOGLIETTA, Ms. HARMAN, Mr. LAROCCO, Mr. KING, Mr. EVANS, Ms. DELAURO, Mr. FRANK of Massachusetts, Ms. VELA IZQUEZ, Mr. NADLER, Mr. TORRES, Mr. REYNOLDS, Mrs. SCHROEDER, Mr. HOCHBRUECKNER, Mr. OBERSTAR, Mr. WHEAT, Mr. HUGHES, Mr. YOUNG of Alaska, Mr. VENTO, Mr. MEEHAN, and Mr. KLINK

SEPTEMBER 22, 1993

Additional sponsors: Mr. HASTINGS, Mrs. KENNELLY, Mr. WYNN, Miss COLLINS of Michigan, Mr. ABERCROMBIE, Mr. DEFAZIO, Mr. MENENDEZ, Mr. GENE GREEN of Texas, Mr. BROWN of Ohio, Mr. BORSKI, Mr. COYNE, Mr. THOMPSON of Mississippi, Mr. MARKEY, Mr. NEAL of Massachusetts, Mr. CARDIN, Mr. PASTOR, Mr. STUDDS, Ms. SLAUGHTER, Mr. PAYNE of New Jersey, Mr. BONIOR, Mr. SWIFT, Ms. KAPTUR, Mr. LEWIS of Georgia, Mr. BARRETT of Wisconsin, Mr. DICKS, Mr. BACCHUS of Florida, Mr. MARTINEZ, Ms. CANT WELL, Mr. SWETT, Mrs. MALONEY, Mr. SERRANO, Mr. MOLLOHAN, Mr. ANDREWS of Maine, and Mr. POMEROY

TEXT:

A BILL

To amend the Employee Retirement Income Security Act of 1974 to provide

that such Act does not preempt certain State laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ERISA PREEMPTION RULES NOT TO APPLY TO CERTAIN ADDITIONAL STATE LAWS.

Section 514(b) of the Employee Retirement Income Security Act of 1974
(29 U.S.C. 1144(b)) is amended by adding at the end the following new paragraph:

"(9) Subsection (a) shall not apply to —

"(A) any provision of State law to the extent that such provision requires the payment of prevailing wages, including employee benefits, on public projects and permits any prevailing employee benefit plan contribution or cost requirement of such law to be met by crediting

"(i) the payment of employee benefit plan contributions or costs,

"(ii) the payment of wages in lieu of such contributions or costs, or

"(iii) the payment of a combination of wages and such contributions or costs; except that this subparagraph shall not be construed to exempt from subsection (a) any such provision to the extent it otherwise mandates the maintenance of, or otherwise regulates the benefits or

operations of, any employee benefit plan;

"(B) any provision of State law to the extent that such provision —

"(i) establishes minimum standards for the certification or registration of apprenticeship or other training programs,

"(ii) concerns the establishment, maintenance, or operation of a certified or registered apprenticeship or other training program, or

"(iii) makes certified or registered apprenticeship or other training an occupational qualification, and does not conflict with any right, requirement, or duty established under this title; or

"(C) any provision of State law to the extent that such provision provides for a mechanics' lien or other lien, bonding, or other security for the collection of delinquent contributions to a multiemployer plan.".

SEC. 2. EFFECTIVE DATE.

The amendment made by section 1 shall take effect on the date of the enactment of this Act and shall apply to matters with respect to which actions are pending on or after such date.

APPENDIX E — SENATE BILL NO. 1580

FULL TEXT OF BILLS

103RD CONGRESS; 1ST SESSION
IN THE SENATE OF THE UNITED STATES
AS INTRODUCED IN THE SENATE

S. 1580

1993 S. 1580; 103 S. 1580

SYNOPSIS:
A BILL To provide that the Employee Retirement Income Security Act of 1974 does not preempt certain State laws, and for other purposes.

DATE OF INTRODUCTION: OCTOBER 21, 1993

DATE OF VERSION: OCTOBER 22, 1993 — VERSION: 1

SPONSOR(S):
Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

TEXT:
* Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *
SECTION 1. ERISA PREEMPTION RULES NOT TO APPLY TO CERTAIN ADDITIONAL STATE LAWS.

Section 514(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144(b)) is amended by adding at the end the following new paragraph:

Appendix E

"(9) Subsection (a) shall not apply to —

"(A) any provision of State law to the extent that such provision requires the payment of prevailing wages, including employee benefits, on public projects and permits any prevailing employee benefit plan contribution or cost requirement of such law to be met by crediting —

"(i) the payment of employee benefit plan contributions or costs,

"(ii) the payment of wages in lieu of such contributions or costs, or

"(iii) the payment of a combination of wages and such contributions or costs; except that this subparagraph shall not be construed to exempt from subsection (a) any such provision to the extent it otherwise mandates the maintenance of, or otherwise regulates the benefits or operations of, any employee benefit plan;

"(B) any provision of State law to the extent that such provision —

"(i) establishes minimum standards for the certification or registration of apprenticeship or other training programs,

"(ii) concerns the establishment, maintenance, or operation of a certified or registered apprenticeship or other training program, or

"(iii) makes certified or registered apprenticeship or other training an

occupational qualification, and does not conflict with any right, requirement, or duty established under this title; or

"(C) any provision of State law to the extent that such provision provides for a mechanics' lien or other lien, bonding, or other security for the collection of delinquent contributions to a multiemployer plan.".

SEC. 2. EFFECTIVE DATE.

The amendment made by section 1 shall take effect on the date of the enactment of this Act and shall apply to matters with respect to which actions are pending on or after such date.